

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



ORIGINAL **75-7233**

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

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EARL B. LEWIS, HERBERT D. PARSONS, ROBERT  
J. C. MURRAY, RUTHVEN H. LEE, CLARENCE T.  
CHLADEK, ROBERT C. ARCH, HARRY L. DAVIS,  
"O" "C" SMITH, KENNETH TAYLOR, FRANCIS  
C. KOPAS, JAMES H. RICHMOND, JR., CULVER Q.  
HOLT, WILLIE P. JACQUET, ANTHONY ALVES,  
ALBERT F. RYAN, JOHN KARDOS, TIMOTHY  
J. O'DONOVAN, MARTIN J. URBAN, LOUIS G.  
FONTENOT, JACQUES H. BLANCHARD, ROBERT  
O. MEDLOCK, MONICO DAVIS, ATHENS WALKER,  
JOSEPH A. BARON, MELVIN JAMES, JOE W.  
THROWER, JUNIOUS McCALL, HAROLD F. Mc-  
LEAN, JOSEPH H. BOLAND, THOMAS W. CHAS-  
TAIN, JR., PHILIP AUSTER, MAURICE C. LE-  
BLANC,

*Plaintiffs-Appellees,*

*against*

TEXACO INC.,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

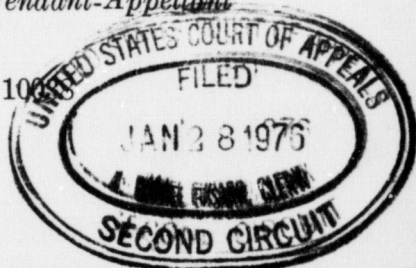
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**PETITION FOR REHEARING OF DEFENDANT-  
APPELLANT TEXACO INC. AND SUGGESTION  
FOR REHEARING EN BANC**

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JUNIOUS MCCALL, HAROLD F. MCLEAN, JOSEPH H. BOLAND,  
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*Plaintiffs-Appellees,*

*against*

TEXACO INC.,

*Defendant-Appellant.*

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## PETITION OF DEFENDANT-APPELLANT TEXACO INC. FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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### Preliminary Statement

This petition is submitted by defendant-appellant Texaco Inc. for rehearing and suggestion for rehearing *en banc* pursuant to Rule 40 of the Federal Rules of Appellate Procedure as supplemented by Rule 40 of the Rules

of the United States Court of Appeals for the Second Circuit. The petition seeks a rehearing of the majority decision of this Court written by Circuit Judge Feinberg with Circuit Judge Moore separately concurring and dissenting rendered December 9, 1975 following oral argument on October 24, 1975 which affirmed a determination of the United States District Court, Southern District of New York (United States District Judge Motley) that Texaco was obligated to reimburse the thirty-two plaintiffs, constituting the entire unlicensed crew of the "TEXACO ILLINOIS" in an amount equal to one month's wages under 46 U.S.C. § 594 together with prejudgment interest for breach of the voyage contained in foreign shipping articles. The majority did remand for the limited purpose of reviewing the issue of counsel fees.

The application for rehearing is directed solely towards the first issue decided in the majority opinion, namely that Texaco was required to sustain the burden of proof of the validity of the seamen's release executed by the thirty-two plaintiffs by establishing the plaintiff's so-called "state of mind" pursuant to the principles of *Garret v. Moore-McCormack Co.*, 317 U.S. 239 and its progeny. It held that merely for Texaco to establish *prima facie* proof of the executed release and the absence of fraud and coercion (as to which the plaintiffs offered no proof) was insufficient to sustain Texaco's burden of proof.

The basis for Texaco's requested rehearing is the recent United States Supreme Court decision by Justice Marshall writing for a *unanimous* Court in *American Foreign Steamship Co. v. Lillian M. Matisse*, (not as yet officially reported, U.S. Supreme Court Docket No. 74-966, Volume 36 CCH United States Supreme Court Bulletin No. 12, pp. B342-B354) decided December 16, 1975, seven days after the decision in the instant appeal. It is respectfully submitted for the following reasons that the *Matisse* decision has a material bearing on the earlier determination by

this Court in this litigation and should require a reversal of the decision of the District Court with directions to enter judgment in favor of respondent-appellant, Texaco, Inc.

### POINT I

#### **The Court Erred in Requiring Texaco to Prove "State of Mind" to Sustain the Release and this Proposition is Now Clearly Supported by the *Matise* Decision.**

As noted in Texaco's original brief filed on the main appeal, it is Texaco's basic contention that the release and mutual consent contained in the shipping articles, once received into evidence, and in the absence of proof of fraud or coercion, is *prima facie* valid to defeat the plaintiffs' right of recovery herein. That, unlike the situation of the personal injury release executed by a seaman, "state of mind" of the plaintiff-seamen should play no part as a requirement in establishing the validity of a release taken by a United States Shipping Commissioner under foreign shipping articles.

The majority opinion herein noted that "the greater weight of authority does not confine the general rule regarding seamen's releases to personal injury claims \* \* \*". It is submitted, however, that the recent decision of a unanimous Supreme Court in *Matise, supra*, specifically indicates that such a distinction exists. *Jones v. American Export Isbrandtsen Lines Inc.*, 285 F. Supp. 345 (S.D.N.Y. 1968). The attention of the Court is respectfully directed to footnote 12 of the *Matise* decision found in 36 CCH at page B350 which reads as follows:

"The Court of Appeals rejected the District Court's finding that *Matise* had consented to the purchase of the airline ticket with part of the wages due him, in part because of its conclusion that *Matise* was 'com-

pelled to sign the release and Wage Voucher in order to receive the remainder of his wages that admittedly were due'. 448 F.2d at 473. *But there is nothing in the record to indicate that Matisse's signing the wage voucher and release was the product of any such compulsion.* Indeed, no claim is made that Matisse registered any dissatisfaction whatsoever with either the form or amount of his wages until some months after signing the release. *Nor was he the subject of any fraud or misrepresentation.* See n. 14, *infra*. Accordingly, the District Court's finding that Matisse had consented to and approved the form and amount of his wage payment was not clearly erroneous and should have been respected by the Court of Appeals." (emphasis supplied)

Nothing in that footnote even implies that "state of mind" should be a part of the test in assessing the validity of a release and mutual consent obtained under shipping articles. As in *Matisse*, there is nothing in the instant case to indicate that the plaintiffs signing off the articles which contained the release "was (were) the product of any (such) compulsion". Moreover, there is no proof whatsoever upon the record of the District Court that the plaintiffs were the object of "any fraud or misrepresentation". Therefore, to sustain the release, *Matisse* clearly indicates that no further showing, such as "state of Mind" is required.

Texaco's main brief filed in this Court on the initial appeal is replete with arguments and distinctions as to why the *Garret* "state of mind" rule should not be the rule where the release is part of a discharge occurring under the supervision of a United States Shipping Commissioner, to say nothing of the presence of the union official. These arguments will not be reiterated here. Suffice to say that that part of Circuit Judge Moore's opinion dissenting from the majority holding that "Texaco should [not]

have been required to prove state of mind, once the releases were signed in the presence of a Shipping Commissioner and the seamen were represented by a union official who supervised the sign-off procedures and who was also in contact with union headquarters" should, in light of the decision in *Matisse*, now constitute the majority view.

Moreover, the majority also noted in the concluding paragraph of Point I of its decision that 46 U.S.C. § 597 permits the District Court to set aside a release for "good cause shown". Texaco does not quarrel with the purpose and intent of section 597 but merely raises the question as to what is to be the standard for "good cause shown". In view of the *Matisse* decision, it submits that the standard can only be compulsion, fraud and coercion.

### Conclusion

For the foregoing reasons it is respectfully requested that this petition for rehearing and suggestion for rehearing *en banc* be granted, that the original majority decision of this Court be rescinded and the dissent adopted with directions to reverse the determination of the United States District Court, Southern District of New York and enter judgment for defendant-appellant, Texaco, Inc.

Respectfully submitted,

BIGHAM ENGLAR JONES & HOUSTON  
Attorneys for Defendant-Appellant  
Texaco Inc.

JAMES S. McMAHON, JR.  
of Counsel

(59340)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

EARL B. LEWIS, ET AL.,

Plaintiffs-Appellees,

against

TEXACO INC.,

Defendant-Appellant.

State of New York,  
County of New York,  
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 28th  
day of January, 1976, he served two copies of the  
Petition for Rehearing on  
Abraham E. Freedman, Esq.  
the attorney for the Appellees  
by depositing the same, properly enclosed in a securely sealed  
post-paid wrapper, in a Branch Post Office regularly maintained  
by the Government of the United States at 90 Church Street, Borough  
of Manhattan, City of New York, directed to said attorney at  
No. 346 West 17th Street, New York ( ) N. Y.,  
that being the address designated by him for that purpose upon  
the preceding papers in this action.

*David F. Wilson*

Sworn to before me this

28th day of January, 1976.

*Courtney J. Brown*

COURTNEY J. BROWN  
Notary Public, State of New York  
No. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1976